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SUPREME COURT, U.S.

No. 98-994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SAMMY'S OF MOBILE, ET AL., Petitioners,
v.
CITY OF MOBILE, ALABAMA, Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether a local government can adopt an ordinance which is clearly content-based and prohibits expression only as to forms of conduct that are inherently and traditionally communicative?

2. Whether a local government can adopt a content-neutral or content-based form of legislation with a complete failure to establish either the existence or advancement of a legitimate governmental interest, in direct conflict with this Court's decision in *44 Liquormart v. Rhode Island, infra.*?

3. Whether a local government may condition the conferral of a benefit on the surrender of a constitutional right in order to engage in First-Amendment protected activities in direct conflict with the "doctrine of unconstitutional conditions" set forth in this Court's decision in *Perry v. Sindermann, infra.*?

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[1] **The Respondent has disagreed with Petitioners' Questions Presented for Review and simply stated that the sole question presented is whether this Court should exercise its discretion to grant the Petition. The Petitioners will address the Respondents Brief in a fashion responsive to the Questions presented herein.**

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CASE NO. 98-994

IN THE
SUPREME COURT OF THE UNITED STATES
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SAMMY'S OF MOBILE, ET AL., Petitioners,
v.
CITY OF MOBILE, ALABAMA, Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case, and herein submit their Reply to Respondent's Brief in Opposition.

This Reply to Respondent's Brief in Opposition is arranged in the same sequence as the Respondent's Brief.

I. THE PETITIONERS' REPLY TO RESPONDENT'S ARGUMENT THAT THE PETITION SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CORRECT AND NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS

(1)

In this section of the Respondent's Brief in Opposition, it is suggested that the instant case is one of first impression among the circuits. In beginning the Brief in Opposition at this point, the Respondent has elected to combine all sections presented in the Petition, including those that focused on the necessity for local governments to establish and support a "legitimate or substantial governmental objective" when enacting legislation affecting speech.

Contrary to the footnote quoting Justice Frankfurter (citing *Maryland v. Baltimore Radio Show,* 388 U.S. 912 (1950)), if, in fact, "[W]ise adjudication has its own time for ripening," that time is now, and it is incumbent on this Court to clarify the "secondary effects doctrine" and reconcile the confusion which has been created by the many courts, both state and federal, that have attempted to evaluate and apply the *Barnes* decision.[1] Add to this the dimension created by this Court's decision in *44 Liquormart*,[2] and it is clear that these issues, as articulated in the Petition, call out for analysis and reconciliation.

The Respondent, apparently trying to ignore this Court's decision in *44 Liquormart*, simply makes the statement that "The Court has long upheld regulations prohibiting nude dancers in licensed liquor establishments," and regurgitates a number of decisions that all predate *44*

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[1] *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

[2] *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

Liquormart. The Respondent then makes the bold assertion that, since this Court indicated that the decision in *LaRue*[3] "would come out the same way," the impact of *44 Liquormart* would justify a decision in the instant action that is in direct contradiction with the holding in *44 Liquormart*.

Factually, the distinctions between the vast evidentiary hearings, testimony, and extensive empirical record which underscored the legislation at issue in *LaRue* (as well as virtually every other case relied on by the Respondent) must be contrasted to the absolute lack of any evidence, whatsoever, promulgated in support of Mobile's challenged legislation. It is clear that the challenged legislation would not satisfy the most *basic* scrutiny, since it had *no* evidentiary basis for its adoption, and the only evidence presented established that the Petitioners' businesses *did not* cause any "adverse secondary effects." Vague references in the preamble of the legislation simply do not justify the expansive restrictions and chilling effect on free speech imposed by the challenged legislation.

(2)

When a concept as important as free speech is at issue, it would be entirely unacceptable to allow the government to restrict free speech on the basis of a "knee-jerk" recitation of "public health, safety and welfare" concerns. Indeed, the points and authorities cited both in the Petition and herein reject such a mere recitation as a legitimate basis for legislation.

A recent decision issued by the Supreme Court of the State of Pennsylvania, *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), illuminated many of the arguments asserted by the Petitioner. In the *Pap's* case, a "public indecency ordinance" was analyzed under the framework of the *Barnes*

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[3] *California v. LaRue*, 409 U.S. 109 (1972)

decision. The Pennsylvania Supreme Court held that there was significant confusion as to how the *Barnes* decision should actually be applied.[4]

It must be emphasized that the recent *Pap's* decision supports the Petitioners' position that the absence of any evidence presented to or by the City of Mobile to justify the legislation at issue in the instant caseis clearly problematic:

> "We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance." *Pap's A.M. v. City of Erie,* 719 A.2d 273, 279 (Pa. 1998).

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[4] "It is simply not possible to find that Justice Souter's position in Barnes commanded five votes. Even if we were to assume arguendo that his concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and consistent with, the one taken by the Chief Justice, such a concession would provide only four votes for Justice Souter's position. The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on nude dancing are not to be analyzed pursuant to the First Amendment. Nor can it be said that the dissenters, who rejected the notion that the state's goal of combating secondary effects via the statute rendered the statute content-neutral, were in agreement with Justice Souter. We find that the Commonwealth Court's determination that Justice Souter's "secondary effects" rationale represents the "holding" of Barnes is simply not borne out. In fact, aside from the agreement by a majority of the Barnes Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the Barnes Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes on the issue of whether the Ordinance in the matter sub judice passes muster under the First Amendment." *Pap's*, 719 A.2d at 278.

As will be shown in the following section, the confusion over the necessity of a governmental body to establish the existence of "adverse secondary effects" obscures any clear-cut distinctions between the application of a "searching" level of scrutiny or a lesser standard.

(3)

In this section of the Respondent's Brief, a lengthy criticism of the Petitioners' arguments and the points raised in the Eleventh Circuit's dissent are unpersuasive. The Respondent attempts to convince this Court that the City of Mobile's legislation was not intended to have any impact on the message of exotic dancing. The Respondent submits that since the legislation was aimed at the "adverse secondary effects" of the Petitioners' businesses, and was "attempting only to regulate the sale of alcohol in inappropriate places," the Mobile ordinance was unrelated to the suppression of free expression. This position is belied by the fact that, as stated in the Respondent's footnote 2, "Mobile has repeatedly stated it only intends to enforce the ordinance against topless bars."

This type of an admission makes clear the fact that the primary motive of adopting the ordinance was to destroy the specific type of business operated by the Petitioners, specifically, a business created, licensed, and developed to present expressive dance performances *in conjunction with* the sale of alcoholic beverages. As stated at the public hearings held pursuant to the adoption of the ordinance, the operation of these types of businesses caused no adverse secondary effects, a fact which casts significant doubt on the sincerity of the City of Mobile's stated goals.

Since the City of Mobile has admitted that the legislation at issue would only be enforced against businesses like the Plaintiffs', the City of Mobile cannot look to the *Barnes* decision as insulation from the constitutional

infirmities inherent in this legislation, and it must be concluded that, as stated by the Eleventh Circuit dissent, Mobile's ordinance is clearly content-based.[5]

As will be emphasized in the next section, the Eleventh Circuit majority has ultimately asserted that no empirical evidence, whatsoever, is necessary to justify the adoption of an ordinance such as that passed by the City of Mobile. Indeed, their holding would allow mere "common sense" to serve as the basis for such legislation. If an individual in a free society is to be forced to accept a restriction on his or her freedom, it should be an absolute requirement that any governmental body imposing such a restriction prove that the "benefit" of any restriction or censorship is far more than simply "theoretical." Clearly, this can never be tested if the basis for such an ordinance is mere "common sense." The City of Mobile had absolutely no basis to support it's ordinance and, if the City argues that it was based on "common sense," this is only a matter of opinion that should never be accepted as the basis for a restriction impacting speech.

(4)

In this portion of Respondent's Brief, the sharp focus is brought to perhaps the most troubling aspect of the Eleventh Circuit majority opinion. Specifically, this is contained in that portion of the Eleventh Circuit decision which apparently found that the Mobile ordinance satisfied the

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[5] This admission, which was stated in footnote 2 on page 3 of the Respondent's Brief, specifically states "The case at bar arose in the context of a pre-enforcement challenge. Mobile has repeatedly stated it only intends to enforce the ordinance against topless bars. Accordingly, the District Court declined to consider an overbreadth challenge because it is not yet ripe, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 n.1 (1982) and *Poe v. Ullman*, 367 U.S. 497 (1961)."

"second *Barnes-O'Brien* prong because it furthers an important or substantial governmental interest." The Respondent's Brief continues to state that, "In so holding, the Court of Appeals determined that Mobile had a "reasonable basis" for believing its ordinance will serve its substantial governmental interest in avoiding the adverse secondary effects of "nudity and sexually explicit entertainment coupled with alcohol in public places." (Respondent's Brief, page 14).

This is simply not supported by the record in the instant case, and the greatest problem lies in the erroneous conclusion that "the Eleventh Circuit located this reasonable basis" in the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense." As emphasized in the Petition, when the City of Mobile adopted its ordinance there was *no evidence* related to the "experience of other cities," *no evidence* regarding "studies done in other cities," *no* discussion or recitation of "case law reciting findings on the issue," and no basis asserted, whatsoever, other than the Twenty-first Amendment. *44 Liquormart* dramatically changed the "knee-jerk" justification for such legislation by simply relying on the Twenty-first Amendment.

Without belaboring the issue, there *is* a dramatic split among the Circuits on the issue of the necessity for governmental entities to establish and support a legitimate or substantial governmental objective when enacting legislation "prohibiting nudity in bars," the issue as framed by the Respondent.

The significant issues which were addressed, but not resolved in the *Barnes* decision are clearly emphasized by the Respondent. Regardless of the instructive advice as to how to discern a coherent statement of the law from a complex opinion such as *Barnes* (even when analyzed under *Marks v. United States,* 430 U.S. 188 (1977)), history has shown that

the application of the *Barnes* decision has resulted in confusion, an inconsistent application of judicial interpretations, and the opportunity for content-based abuses. These abuses are made possible when the necessity for justification of the governmental restrictions on free speech are foreclosed. If the Respondent's position is correct, and the Eleventh Circuit's majority opinion is upheld, then the many legal scholars identified in the law review articles cited in the Petition will have to acknowledge that their greatest fears regarding the misapplication of the "adverse secondary effects doctrine" have become a reality.

Many of the cases relied upon by the Respondent identify this problem with great clarity. In *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997), *Buzetti v. City of New York*, 140 F.3d 134 (2nd Cir.) *cert. denied*, ____ U.S. ___, 119 S.Ct. 54 (1998), *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991), and *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998), there was evidence presented to justify and support the adoption of the respective legislation in these cases.

In *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 162 (1998), the Tenth Circuit reversed a district court finding that even though the City of Aurora had presented evidence of adverse secondary effects engendered by businesses significantly different than the one operated by the plaintiff in that action, such evidence was still sufficient to support the justification for the ordinance. Nonetheless, the Circuit Court emphasized that the City of Aurora did not "seek to justify its actions with a completely barren record." *Id.* at 690.

Citing *Discotheque, Inc. v. City Council of Augusta,* 264 Ga. 623, 449 S.E.2d 608, 609-10 (1994) (summary judgment improper in favor of City where City produced no probative evidence of experience of other municipalities

regarding negative secondary effects of sexually oriented businesses), and *Quetgles v. City of Columbus,* 264 Ga. 708, 450 S.E.2d 677, 678 (1994), *cert. denied,* 514 U.S. 1083, 115 S.Ct. 1794, 131 L.Ed.2d 722 (1995) (same), it is clear that a "barren record," which was all the City of Mobile had to support its ordinance, is not sufficient.

It should be clear to the Court that the confusion suffered by courts attempting to apply the *Barnes* decision, the apparent reliance on *Barnes* by the Circuit Courts to justify entirely different and inconsistent theories, and the clear conflict that exists (a conflict clearly established even by the Respondent's citation of authorities), justifies the granting of the instant Petition. Indeed, if the Court reviews the decision in *Pap's*, and reviews the decision *in J&B Entertainment, Inc. v. City of Jackson* at 152 F.3d 362 (5th Cir. 1998),[6] it is clear that the importance of the issue,[7] the troubling conflicts between the Circuits, and the other issues cogently addressed in the Petition, all indicate that it would be appropriate for this honorable Court to grant the Petition, review these issues, and provide the much needed guidance and reconciliation that this Court was designed to provide.

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[6] This decision again went through a lengthy analysis of the "fragmented Supreme Court" in *Barnes*, and made a strict finding that any conclusion that a government does not need to introduce evidence to justify an ordinance regulating public nudity challenged on First Amendment grounds was blatantly erroneous.

[7] Both the Petitioners and their Counsel would respectfully submit that nothing in this Country is as important as the First Amendment.

CONCLUSION

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Clearly, the issues involved in this action go far beyond the mere facts of the instant case, and provide this Court with the unique opportunity to reconcile the misapprehensions suffered by the many state and federal courts attempting to interpret the holdings in *Barnes v. Glen Theatre* and *44 Liquormart* in a way that does not lead to the absence of "equal justice under the law." Regardless of the scrutiny applied, it is clear that this Court can provide much needed guidance in an unsettled and controversial area of First Amendment jurisprudence by granting the instant petition for writ of certiorari.

Respectfully submitted,

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